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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: LIN-01-072-52095 Office: Nebraska Service Center

Date: JAN 24 2003

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

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INSTRUCTIONS:

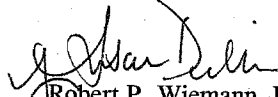
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a sports/athletic training facility with ten employees and a gross annual income of \$250,000. It seeks to employ the beneficiary as a gymnastics coach for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The director denied the petition because the duties described by the petitioner did not appear to be so complex as to require a baccalaureate degree in a specific specialty.

On appeal, counsel asserts that the petitioner requires a bachelor's degree in physical education or a related field for the proffered position and also that the degree requirement is common to the industry in parallel positions among similar organizations. Finally, counsel argues that the Service has already determined that the proffered position is a specialty occupation since the Service has approved other H-1B visa petitions for gymnastic coaching positions.

Counsel's assertions on appeal are not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

The employee will be primarily responsible for designing and carrying out advanced gymnastics programs for

national and international competitions, applying the knowledge of athletic talent identification, sports physiology, sports treatment and corrective technologies in advanced gymnastics; and will coach, instruct and demonstrate in both the fundamentals and the advanced techniques and methods of gymnastics. His specific duties include 1) conceive and develop work-out plans, determine competitive line-ups and level of difficulty of exercise and choreograph for each individual high level gymnast, as well as the making-up flexibility and strength training program; 2) coach gymnasts for regional, national and international competitions; 3) observe gymnasts while they performing [sic] and instruct gymnasts in strategies and techniques; and 4) train instructing staff in high-level gymnastics and coaching techniques.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

Counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the Department of Labor's Dictionary of Occupational Titles (DOT) (4th Ed., Rev. 1991). The Associate Commissioner does not, however, consider the DOT a persuasive source of information regarding whether a particular job requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation.

The Department of Labor has replaced the DOT with the Occupational Information Network (O*Net). Both the DOT and O*Net provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The Department of Labor's Occupational Outlook Handbook (Handbook) provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, the Service is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the DOT.

The proffered position parallels that of a coach or sports instructor as those jobs are described by the Department of Labor (DOL) in its Occupational Outlook Handbook (Handbook), 2002-2003 edition. A review of the Handbook at pages 128-129 finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a sports instructor or coach. A baccalaureate degree is required for coaches and sports instructors in schools, but there is no indication that a degree in a specific specialty is required. Certification is highly desirable for those interested in becoming tennis, golf, karate, or any other kind of sports instructor. Employers often require that a sports instructor be at least 18 years old and CPR certified. Participation in a camp, clinic, or school usually is required for certification.

Counsel argues that the director ignored the portion of the regulations at 8 C.F.R. 214.2(h)(4)(iii)(A) stating that a baccalaureate or higher degree in a specific specialty **or its equivalent** is normally the minimum requirement for entry into the occupation is not persuasive. Counsel does not, however, submit any independent evidence to corroborate the assertion that this particular position requires the equivalent of a bachelor's degree in a specific specialty. It was held in Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988) and Matter of Ramirez-Sanchez, 17 I&N Dec. (BIA 1980) that the assertions of counsel do not constitute evidence. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is normally the minimum requirement for the position being offered to the beneficiary. (emphasis in original.)

Additionally, the petitioner has not shown that the requirement of a bachelor's degree in physical education or a related specialty is common to the industry in parallel positions among similar organizations. The record contains six job ads, five for gymnastics coaching positions and one for a gym teacher in a private school. Only one of these prospective employers requires a bachelor's degree in physical education or a related field. One

prospective employer requires a bachelor's degree, but there is no stated requirement of a bachelor's degree in physical education or a related field. Two prospective employers prefer, but do not require, a bachelor's degree and certification as a gymnastics coach. Two positions prefer, but do not require, degrees in early childhood education. As such, these job ads do not demonstrate an industry standard.

The record contains two advisory opinion letters from individuals involved in gymnastics. One states that the usual requirement for gymnastic coaching positions is a baccalaureate degree in physical education. The other states that having a "highly educated" coach is very important. Two letters are insufficient evidence of an industry standard. Additionally, neither writer has not provided any independent evidence to corroborate the statement that the requirement of a bachelor's degree in a specific specialty is standard to the industry in parallel positions among similar organizations. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Although the petitioner states that it requires a bachelor's degree in physical education or a related field for the proffered position, the evidence of record does not support this statement. The record contains a list of the staff gymnastics coaches employed by Chow Gymnastics. A review of this list reveals that the staff coaches have a variety of educational backgrounds. Four coaches, including the co-owners of the facility, have bachelor's degrees in sports science, sports training, or a related field. One has a master's degree in occupational therapy and one has a master's degree in health care nursing. One has an associate degree; one is a candidate for a bachelor's degree in sport management; one is a candidate for a bachelor's degree in engineering; one is a candidate for a bachelor's degree in communication and journalism; and the two coaching assistants have high school diplomas.

Furthermore, counsel's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000).

The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a

bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, the proffered position of gymnastics coach does not meet the statutory definition of specialty occupation. The position does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has indicated that it requires a bachelor's degree in physical education or a related field for employment in the offered job, this requirement is the petitioner's preference rather than an indication that the position is a specialty occupation requiring a bachelor's degree in a specific specialty.

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As noted above, the Handbook does not provide any indication that a baccalaureate degree in a specific specialty is required for employment as a gymnastics coach.

With respect to the petitioner's objection to denial of this petition in view of the approval of similar petitions in the past, the Service is not required to approve applications or petitions where eligibility has not been demonstrated. The director's decision does not indicate whether he reviewed the other nonimmigrant petitions referred to by counsel, and this record of proceeding does not contain copies of the previous petitions and their supporting documentation. If the prior petitions were approved based on evidence similar to the evidence contained in this record of proceeding, however, the approval of those petitions would have involved gross error. The Service is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the service nor any other agency must treat acknowledged errors as binding precedent. Sussex Enqq. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988). The Associate Commissioner, through the AAO, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La.).

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.